

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in December 2014

The Board's monthly reports are intended to assist public employers covered by a grievance procedure to monitor significant personnel-related matters which came before the Grievance Board, and to ascertain whether any personnel policies need to be reviewed, revised or enforced. W. Va. Code §18-29-11(1992). Each report contains summaries of all decisions issued during the immediately preceding month.

If you have any comments or suggestions about the monthly report, please send an e-mail to wvgb@wv.gov.

NOTICE: These synopses in no way constitute an official opinion or comment by the Grievance Board or its administrative law judges on the holdings in the cases. They are intended to serve as an information and research tool only.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

KEYWORDS:

Pay Uniformity; Motion to Dismiss; Inter Alia; Work Experience Credit; Moot; Relief; Advisory Opinion

CASE STYLE:

O'Dell, et al. v. Fayette County Board of Education

DOCKET NO. 2014-0854-CONS (12/10/2014)

PRIMARY ISSUES:

Whether Grievants raised a claim for which they may be awarded relief.

SUMMARY:

Grievants allege that Respondent employed an individual to perform like assignments and duties to those performed by Grievants, and gave that individual credit for ten years of work experience earned outside the school setting. Service personnel receive additional salary for each year of work experience with which they are credited. Grievants claim that pursuant to the pay uniformity statute they must also receive credit for work experience they gained prior to being employed by the Respondent to increase their salaries. Respondent investigated Grievants' allegations after the level one hearing and found that one employee was actually receiving credit for prior work experience. Respondent believed this was a mistake and have subsequently removed those years of credit from the individual in question and required that he pay back any amount believed to be an overpayment. Respondent asserts that no other service personnel employee receives credit for work experience outside the school setting which renders the consolidated grievance moot. Grievants only alleged that one employee was receiving work experience credit for work outside the school setting. That employee is no longer receiving such credit. Accordingly the consolidated grievances are moot and must be DISMISSED.

<u>KEYWORDS:</u>	Evaluation; Correctable Conduct; Unsatisfactory Performance; Willful Neglect of Duty; Arbitrary and Capricious
<u>CASE STYLE:</u>	<u>Davis-Wilson v. Hardy County Board of Education</u> DOCKET NO. 2014-1507-HrdED (12/12/2014)
<u>PRIMARY ISSUES:</u>	Whether Respondent's decision to terminate Grievant was proper. Whether Respondent's decision to not renew Grievant's contract of employment was arbitrary and capricious.
<u>SUMMARY:</u>	<p>Respondent contends that Grievant was terminated from employment for willful neglect of duty and insubordination. In addition, Grievant's conduct was not correctable. Grievant asserts that the allegations supporting the termination more closely resemble a charge of unsatisfactory performance. Grievant argues that, based upon the rapid sequence of events leading to the termination of her employment, her dismissal was contrary to the provisions of W. Va. Code § 18A-2-12 because she was not given an opportunity to improve her performance.</p> <p>Grievant was terminated for what amounted to a charge of unsatisfactory performance even though Respondent sought to characterize the charges as willful neglect of duty. In addition, the record established that Grievant's conduct was correctable, and she was making efforts to improve her work performance. Based upon this sequence of events, Grievant's dismissal was contrary to the provisions of W. Va. Code § 18A-2-12 because she was not given an evaluation prior to the termination of her employment, and an opportunity to improve her performance. For the reasons more fully detailed in the discussion of this case related to Grievant's termination, Respondent's decision to not renew Grievant's contract of employment for the 2014-2015 school year was arbitrary and capricious. This grievance is granted.</p>

TOPICAL INDEX
STATE EMPLOYEES

<u>KEYWORDS:</u>	Credibility; Verbal Reprimand; Suspension; Privacy Policies; Arbitrary and Capricious
<u>CASE STYLE:</u>	<u>Willis v. Division of Motor Vehicles</u> DOCKET NO. 2013-2254-CONS (12/9/2014)
<u>PRIMARY ISSUES:</u>	Whether Respondent established impermissible conduct by Grievant sufficient to warrant the discipline imposed.
<u>SUMMARY:</u>	Grievant is employed with the Division of Motor Vehicles as a Customer Service Representative. Respondent bears the burden of establishing the charges against Grievant by a preponderance of the evidence. Where the evidence equally supports both sides, a party has not met its burden of proof. Respondent did not prove all the allegations with which Grievant was charged. It was demonstrated that Grievant participated in conduct at the work place which did not adhere to recognized standards of conduct which reasonably warranted a verbal reprimand. Further, it is determined to be evident that the relationship between Grievant and her supervisor(s) is not ideal. In accordance with a separate and distinct event, Respondent alleges that Grievant breached applicable privacy and confidential policies regarding "Personal Identification Information" (PII). Evidence of record does not sufficiently support Respondent's conclusion that Grievant divulged "PII" to the degree of a privacy policy violated. This grievance is Granted in Part.

KEYWORDS: Motion to Dismiss; Jurisdiction; Employer; Form of Pay; Direct Deposit; Pay Card; Employer

CASE STYLE: Thompson v. Division of Corrections/Huttonsville Correctional Center
DOCKET NO. 2014-0386-MAPS (12/3/2014)

PRIMARY ISSUES: Whether the Public Employees Grievance Board has jurisdiction to resolve a dispute between Grievant and the West Virginia State Auditor or the West Virginia State Treasurer.

SUMMARY: Grievant, an employee of the Division of Corrections, was notified that if he did not sign up for direct deposit, he would be paid on a pay card, which is similar to a debit card. The West Virginia State Auditor's Office and Treasurer's Office are the entities charged with assuring that state employees are paid their salaries, not Respondent, and they are the entities that required Grievant, as well as all other state employees, to receive their pay either by direct deposit or a pay card. The grievance procedure is in place to allow grievants to pursue grievances against the agency which employs them. Inasmuch as Respondent is not responsible for the action about which Grievant complains, and has no authority to resolve the grievance, this grievance will be dismissed.

KEYWORDS: Voluntary Overtime List; Call List; Overtime Rotation

CASE STYLE: Beegle v. Division of Corrections/Northern Correctional Center
DOCKET NO. 2014-0771-MAPS (12/9/2014)

PRIMARY ISSUES: Whether Grievant demonstrated that Respondent violated any statute, rule, policy or procedure, or that he was intentionally not called for voluntary overtime.

SUMMARY: Grievant asserted that Respondent's personnel skipped over his name on the voluntary overtime list, either intentionally or negligently, in violation of policy and procedure. Respondent's records show that personnel placing phone calls to employees on the voluntary overtime list did try to contact Grievant on every occasion contested by Grievant. Grievant did not demonstrate that personnel did not attempt to contact him for available overtime, or that Respondent violated and statute, rule, policy or procedure.

KEYWORDS: Code of Conduct; Incident Report; Policy; Good Cause for Dismissal
CASE STYLE: Harvey v. Regional Jail and Correctional Facility Authority/Southern Regional Jail

DOCKET NO. 2014-1663-CONS (12/12/2014)

PRIMARY ISSUES: Whether Respondent had good cause to terminate Grievant's employment.

SUMMARY: Grievant, the Director of Inmate Services at Southern Regional Jail, and also an Equal Employment Opportunity Counselor, was dismissed from employment for failure to file an EEO report and for violation of the Code of Conduct. While in another room, Grievant overheard a portion of a conversation containing racial innuendo and did not file a report. Grievant was later instructed to file an incident report, which was not completed immediately, but was completed within ninety minutes of the first report completed. Respondent failed to prove Grievant violated policy or otherwise acted in a manner that would justify his dismissal from employment. Respondent did not have good cause to dismiss Grievant from employment. Grievant is not entitled to recover attorney's fees. Accordingly, the grievance is granted.

KEYWORDS: Dismissed; Jurisdiction; Policy; Employer

CASE STYLE: Rossell v. Division of Forestry

DOCKET NO. 2015-0161-DOC (12/12/2014)

PRIMARY ISSUES: Whether the Grievance Board has jurisdiction to adjudicate this grievance.

SUMMARY: Grievant is employed by Respondent, Division of Forestry. However, Grievant is grieving a policy of another agency, the Division of Natural Resources. This policy does not apply to those employed by Respondent. Therefore, Grievant has not raised a challenge to any action taken by his employer. Accordingly, the Grievance Board has no jurisdiction to adjudicate this matter.

KEYWORDS:

Nepotism; De Minimis; Temporary Upgrade; Additional Compensation; Training; Supervisory Responsibilities; Policy

CASE STYLE:

Cobb, et al. v. Division of Highways

DOCKET NO. 2014-0735-CONS (12/22/2014)

PRIMARY ISSUES:

Whether it would violate the nepotism policy for Grievants, who are married to each other, to take occasional temporary upgrades to crew leader in the same DOH unit.

SUMMARY:

Transportation Workers may be assigned temporarily to a crew leader position and receive a temporary upgrade in pay while working in the temporary assignment. These upgrades generally occur when a crew leader is absent due to illness, there is a temporary need for an additional work crew, or to accommodate vacation schedules. At the Amma Facility, where Grievants are assigned, these temporary assignments are viewed as training opportunities, usually last no more than a few days and mostly involve completion of time sheets and other paperwork required of a crew leader. Respondent does not allow Grievants to participate in these upgrades because the supervisors are concerned that it would violate the Division of Personnel Rule related to nepotism. The Division of Personnel rule related to nepotism does not prohibit Grievants from enjoying the benefits of additional compensation and training that could lead to future promotions merely because of possible de minimus, supervisory responsibilities that may occur with temporary upgrades to crew leader positions. Accordingly, the grievances are GRANTED.

KEYWORDS: Selection; Qualifications; High School Degree; Supervisory Experience; Verbal Warning; Insubordination; Reprisal

CASE STYLE: Hart v. Division of Highways and Dale Funk, Intervenor
DOCKET NO. 2014-0744-DOT (12/23/2014)

PRIMARY ISSUES: Whether Grievant demonstrated that the successful applicant was not qualified for the posted position. Whether Respondent demonstrated that Grievant's failure to do what his supervisor wanted done constituted willful disobedience.

SUMMARY: This grievance was filed when Grievant was not selected for a posted Transportation Crew Supervisor I position. Grievant alleged that the successful applicant did not meet the requirements for the position, because he did not hold a high school diploma or G.E.D. The classification specification clearly states that experience may be substituted for the educational requirement, and the Division of Personnel made a determination that the successful applicant met the requirements of the position. Grievant did not demonstrate that the successful applicant did not meet the requirements for the position, or that the selection process was flawed in any way. Grievant also challenged a verbal warning he received after filing the grievance. Grievant testified that he thought his supervisor had told him to spot treat icy spots, while his supervisor testified he told Grievant to treat all areas of the road. Respondent presented no evidence to support a finding that Grievant's action was anything more than a simple misunderstanding of expectations. Respondent did not prove the charges against Grievant.

<u>KEYWORDS:</u>	Probationary Employee; Unacceptable Verbal Language; Unsatisfactory Performance; Misconduct; Progressive Discipline; Mitigation
<u>CASE STYLE:</u>	<u>Campbell v. Berkeley County Health Department</u> DOCKET NO. 2014-1297-BerCH (12/22/2014)
<u>PRIMARY ISSUES:</u>	Whether Grievant demonstrated that the termination of his employment was clearly excessive.
<u>SUMMARY:</u>	Respondent terminated Grievant's probationary employment for use of unacceptable verbal language. Respondent was able to demonstrate that Grievant did use profanity; however, this was demonstrated by Grievant's acknowledge of the behavior and was in no way committed in same context as Respondent represented in its termination notification. Grievant was able demonstrate that the termination of his employment was clearly excessive and reflected an inherent disproportion between the offense and the personnel action. Accordingly, this grievance is granted, in part, and denied, in part.
<u>KEYWORDS:</u>	Classification; Reallocation; Minimum Qualifications; Job Duties; Remedy; Relief; Arbitrary and Capricious
<u>CASE STYLE:</u>	<u>Thompson v. Division of Highways and Division of Personnel</u> DOCKET NO. 2014-0462-DOT (12/31/2014)
<u>PRIMARY ISSUES:</u>	Whether Grievant proved by a preponderance of the evidence that the DOP's decision not to reallocate his position was arbitrary and capricious.
<u>SUMMARY:</u>	Grievant has been employed by the Respondent DOH for twenty-eight years. He has several years of experience in his present classification of Cartographic Drafter. With the advent of the geographic information system which provides data for mapping from satellites, the way Grievant now works with maps has significantly changed, however his main duty continues to be the production of accurate maps for the DOH. Because Grievant now works with GIS programs and metadata he sought reallocation of his position to the Geographic Information Technician classification. The division of personnel denied the reallocation. Even if the relief Grievant seeks (the reallocation of his position to the Geographic Information Technician classification) was granted, Grievant would not be eligible to hold that position because he does not meet the minimum qualification for the classification he seeks. Since there is no remedy available the grievance is DISMISSED.

KEYWORDS:

Hostile Work Environment; Security; Leave Restriction; Morale

CASE STYLE:

Austin, et al. v. Division of Highways

DOCKET NO. 2013-2170-CONS (12/26/2014)

PRIMARY ISSUES:

Whether Grievants proved their claims of hostile work environment by a preponderance of the evidence.

SUMMARY:

Grievants allege that their supervisor has created a hostile work environment for them at their place of work by yelling and cursing at employees, installation of video cameras, and improper assignment of overtime. One Grievant alleged that in addition to these actions, the supervisor also created a hostile work environment for him by placing him on leave restriction and treating him improperly because he was involved in an interracial relationship. Respondent denies all claims made by Grievants. While there was evidence that the supervisor had yelled and cursed at one Grievant, and perhaps other employees, years ago, the evidence presented did not establish the existence of a hostile work environment. Grievants failed to prove their claims by a preponderance of the evidence. Therefore, this grievance is denied.